North Carolina Uniform Power of Attorney Act
Provisions Applicable to Third Persons

By S. Kyle Agee

The interplay between the principal, the agent and third persons asked to accept the agent’s authority under a power of attorney is at the core of one of the fundamental goals of the newly adopted North Carolina Uniform Power of Attorney Act (“NCUPOAA”). Under the NCUPOAA, a multi-tier approach to solving the problem of arbitrary refusals of powers of attorney is implemented in furtherance of the overarching goal of enhancing the effectiveness of powers of attorney, this goal being discussed in Ms. Davies’ article in this newsletter. N.C.G.S. Section 32C-1-102(8) defines a person as “[a]n individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.” For the purposes of this article, “person” shall generally mean and refer to a bank or other financial institution. Also, it is worth noting the drafter’s of the Uniform Power of Attorney Act (“UPOAA”) recognized that statutory liability for unreasonable refusal of a power of attorney was a growing state legislative trend, specifically citing applicable North Carolina statutes (i.e. N.C.G.S. §§ 32A-40 to 3 in the official comments). To this point, many of the provisions of the NCUPOAA will be familiar to those accustomed to Article 5 of Chapter 32A.

Protection Against Liability for Accepting a Power of Attorney

From the perspective of a third person asked to accept a power of attorney, liability may exist if a power of attorney is accepted for a transaction that exceeds the scope of authority conveyed in the power of attorney, if the power of attorney is invalid or a forgery, or if the power of attorney has been terminated or revoked. The NCUPOAA provides significant protection for third persons against such liability.

The first prong in the NCUPOAA’s multi-tier approach to the promotion of enhanced effectiveness of powers of attorney is the grant of broad protection to third persons that accept powers of attorney without imposing any contemporaneous duty to confirm the validity of the power of attorney or the scope of authority of the agent acting thereunder. Under N.C.G.S. Section 32C-1-119, a third person’s acceptance of a power of attorney is protected so long as such person did not possess actual knowledge that the power of attorney is void, invalid or terminated or that the agent is exceeding his or her scope of authority or otherwise improperly exercising his or her authority thereunder.

In analyzing N.C.G.S. Section 32C-1-119, it is important to appreciate the difference between “acknowledged” and “unacknowledged” powers of attorney and to be cognizant of the importance of such distinction to a third person asked to accept a power of attorney. N.C.G.S. Section 32C-1-119(a) provides that “[f]or the purposes of this section and N.C.G.S. 32C-1-120, ‘acknowledged’ means purportedly verified before a notary public or other individual authorized to take acknowledgements.” Further, N.C.G.S. Section 32C-1-119(b) provides “[a] person that in good faith accepts an acknowledged power of attorney without actual knowledge that the signature is not genuine may rely upon the presumption in N.C.G.S. Section 32C-1-105 that the signature is genuine.” As such, one can see how the NCUPOAA provides a statutory framework which provides assurance to third persons limiting potential liability resulting from such third person’s acceptance of a power of attorney.

In a break from the UPOAA, which only applied in this context to acknowledged powers of attorney, N.C.G.S. Section 32C-1-119(c) provides a good faith acceptance exception from liability of third persons to include both acknowledged powers of attorney and unacknowledged powers of attorney. The N.C.G.S. Section 32A-8 does not require acknowledgement of a durable power of attorney, that expansion of liability protection to third persons was warranted. However, it is anticipated that powers of attorney executed under the NCUPOAA going forward will be acknowledged and that the acceptance of unacknowledged powers of attorney by third persons may be limited as determined on a case-by-case basis.

The grant of protection to third persons from liability for the acceptance of both acknowledged and unacknowledged powers of attorney is set forth in N.C.G.S. Section 32C-1-119(c) as follows:

A person that in good faith accepts a power of attorney without actual knowledge that the power of attorney is void, invalid, or terminated, that the purported agent’s authority is void, invalid, or terminated, or that the agent is exceeding or improperly exercising the agent’s authority (i) may rely upon the power of attorney as if the power of attorney were genuine, valid and still in effect, the agent’s authority were genuine, valid and still in effect, and the agent had not exceeded and had properly exercised the authority; and (ii) shall not be held responsible for any breach of fiduciary duty by the agent, including any breach of loyalty, any act of self-dealing, or any misapplication of money or other property paid or transferred as directed by the agent.

As is apparent from the broad general release from liability under this subsection, the risk of acceptance of a power of attorney rests squarely upon the principal and the agent and not the third person under the NCUPOAA. This approach is intended...
to promote acceptance of powers of attorney, which is essential to their usefulness as an alternative to guardianship.

While the broad grant of limited liability in itself should promote greater acceptance of powers of attorney, a third person may, in its discretion, request a certification to the "effect that the agent did not have actual knowledge at the time of the presentation of the power of attorney to the [third person] (i) that the power of attorney is void, invalid, or terminated, or (iii) of facts that would cause the agent to question the authenticity or validity of the power of attorney." See N.C.G.S. § 32C-1-119(d). A certification meeting the requirements of N.C.G.S. Section 32C-3-302 is deemed sufficient proof to the requesting third person that (i) the power of attorney is authentic and valid and has not been terminated, (ii) the agent's authority is valid and has not been terminated, and (iii) other factual matters stated in the certification regarding the principal, agent, or power of attorney are true. Thus, where a third person wishes to enhance its "good faith acceptance" protection provided by N.C.G.S. Section 32C-1-119(c), it may request such a certification by the agent. To reiterate, however, although a third person has the option of requesting an agent's certification as to a matter of fact, an English translation, or an opinion of counsel as to a matter of law, these precautions are not required for the acceptance of the power of attorney to be protected.

A further layer of protection to third persons is found in N.C.G.S. Section 32C-1-119(f) whereby institutions that conduct activities through employees are deemed to be without actual knowledge of a fact relating to a power of attorney, a principal, or an agent if the employee conducting the transaction is without actual knowledge of the act. In light of the fact that financial institutions often conduct business in multiple offices in various cities and states, an imputed knowledge standard is not appropriate in the context of conducting transactions under powers of attorney. Thus, the NCUPOAA's broad protections under N.C.G.S. Sections 32C-1-119 and 120, coupled with the statutory rejection of any imputed knowledge standard, substantially limits financial institution liability.

Of equal importance to the concern that a power of attorney will be unreasonably refused is the concern that the power of attorney will be abused by the agent. To mitigate this concern, the NCUPOAA contains express language to address common types of abusive transactions perpetrated by agents under powers of attorney. The grants of general and specific authority are detailed in another article in this newsletter.

As it relates to third persons, the grants of general and specific authority provide a statutory framework that further promotes the goal of enhancing the effectiveness of powers of attorney. In addition to potential liability for an unreasonable refusal to accept or a rejection not conducted in good faith, third persons are concerned with liability for allowing an agent to conduct a transaction exceeding his or her scope of authority. With respect to liability for transactions that exceed the agent's scope of authority, the NCUPOAA lessens the likelihood of liability for such transactions by providing statutory construction language for most common subject areas that might be included under a general grant of authority. While this language can be modified in the power of attorney, third persons accepting a power of attorney now have a clearly defined statutory framework for the meaning of authority over subject areas such as "banks and financial institutions" (N.C.G.S. § 32C-2-208), "insurance and annuities" (N.C.G.S. § 32C-2-210), and "retirement plans" (N.C.G.S. § 32C-2-215). The NCUPOAA also provides that express authority is required for certain activities that involve common abuses perpetrated with powers of attorney such as self-dealing transactions and transactions that violate the principal's expectations. The clarity provided by the NCUPOAA with respect to delegation of authority lessens the likelihood that a principal or the third person who accepts the power of attorney will misunderstand the authority granted.

Protection Against Liability for Rejecting a Power of Attorney

The second prong in the NCUPOAA's multi-tier approach to the promotion of enhanced effectiveness of powers of attorney provides clear safe harbors for legitimate refusals of powers of attorney. Under the NCUPOAA, a third person is not required to accept an acknowledged power of attorney if one of several safe harbors applies. Additionally, and notwithstanding the broad protection from liability under N.C.G.S. Section 32C-1-119(c), a third person may reject an unacknowledged power of attorney with impunity and without fear of liability. While the NC drafters felt it was prudent to widen the breadth of protection to third persons for accepting powers of attorney under N.C.G.S. Section 32C-1-119, the mandate to accept a power of attorney under N.C.G.S. Section 32C-1-120, absent a legitimate safe harbor, was determined to be appropriate to apply only to acknowledged powers of attorney.

When presented with an acknowledged power of attorney, absent a legitimate reason for refusal, N.C.G.S. Section 32C-1-120(b) provides several timelines that must be adhered to in order to avoid the imposition of a court mandate or award of costs, attorneys' fees or other remedies available under NC law. No later than seven business days after presentation of an acknowledged power of attorney for acceptance, a person shall (i) accept the power of attorney, (ii) refuse to accept the power of attorney, or (iii) request a certification, a translation, or an opinion of counsel under N.C.G.S. Section 32C-1-119(d). Additionally, if a person requests a certification, a translation, or an opinion of counsel, then within five business days after receipt of the requested item(s) in reasonably satisfactory form, the person shall either (i) accept the power of attorney, or (ii) refuse to accept the power of attorney. It is noteworthy that under N.C.G.S. Section 32C-1-120(b)(3), a third person may not require an additional or different form of power of attorney if the power of attorney presented reasonably appears to authorize the agent to conduct the business the agent desires to conduct.

Under N.C.G.S. Section 32C-1-120(c), a third person may refuse to accept a power of attorney without liability if any of the following exist:

1. The third person is not otherwise required to engage in a transaction with the principal in the same circumstances;
2. Engaging in a transaction with the agent or the principal in the same circumstances would be inconsistent with applicable law;
3. The third person has actual knowledge of the termination of the agent's authority or of the power...
of attorney before exercise of the power;
4. A request for certification, a translation, or an opinion of counsel pursuant to N.C.G.S Section 32C-1-119(d) is refused;
5. The third person requesting the certification, a translation, or an opinion of counsel pursuant to N.C.G.S. Section 32C-1-119(d) does not receive the requested item(s) in reasonably satisfactory form within a reasonable time;
6. The third person in good faith believes that the power of attorney is not valid or that the agent does not have the authority to perform the act requested, whether or not a certification, a translation, or an opinion of counsel pursuant to N.C.G.S. Section 32C-1-119(d) has been requested or provided;
7. The third person has reasonable cause to question the authenticity or validity of the power of attorney or the appropriateness of its exercise by the agent;
8. The agent or principal has previously breached any agreement with the person, whether in an individual or fiduciary capacity; or
9. The third person makes, or has actual knowledge that another person has made, a report to the local adult protective services office or law enforcement stating a good faith belief that the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent or a person acting for or with the agent.

Three additional safe harbors, applicable to financial institutions and carryovers from N.C.G.S. Section 32A-42(b), are provided in N.C.G.S. Section 32C-1-120(d) that do not require a person to do any of the following:

1. Open an account for a principal at the request of an agent if the principal is not currently a customer of the person;
2. Make a loan to the principal at the request of the agent; or
3. Permit the agent to conduct business not authorized by the terms of the power of attorney, or otherwise not permitted by applicable statute or regulation.

The third prong in the NCUPOAA's multi-tier approach to the promotion of enhanced effectiveness of powers of attorney becomes applicable if a third person’s refusal of a power of attorney does not meet one of the foregoing safe harbors. Under N.C.G.S. Section 32C-1-120(e), a person that refused to accept an acknowledged power of attorney without legitimate grounds for refusal is potentially subject to:

1. A court order mandating acceptance of the power of attorney;
2. Liability for reasonable attorney’s fees and costs incurred in any action or proceeding that man-

Additionally, N.C.G.S. Section 32C-1-120(f) provides that “[t]he principal, the agent or a person presented with a power of attorney may initiate a proceeding to determine whether and to what extent acceptance of a power of attorney shall be mandated. The court may award costs and expenses, including reasonable attorneys' fees to the agent only where the proceeding has substantial merit.” Also, under N.C.G.S. Section 32C-1-116(a)(4)(e), subject matter jurisdiction for such proceeding runs concurrent between the clerk of superior court and the superior court.

Other Third Person Provisions

Under N.C.G.S. Section 32C-1-122, the NCUPOAA does not supersede any other law applicable to financial institutions or other entities, and the other law controls if inconsistent with the NCUPOAA. The purpose of this provision is to alleviate any concerns that there might be certain regulations or other applicable law which govern financial institutions and other entities which may conflict with the provisions of the NCUPOAA. It should be noted that N.C.G.S. Section 32C-1-120(b)(2) provides a safe harbor for refusal to accept a power of attorney for any transaction that would be inconsistent with applicable law.

A power of attorney created pursuant to the NCUPOAA is durable unless the instrument expressly provides that it is terminated by the incapacity of the principal under N.C.G.S. Section 32C-1-104. The presumption of durability should act to further promote the acceptance of powers of attorney by third persons by alleviating concerns that often surrounds the validity of powers of attorney upon the incapacity of the principal prior to recordation under current N.C.G.S. 32A-9.

Under N.C.G.S. Section 32C-1-105, “a power of attorney must be (i) signed by the principal or in the principal's conscious presence by another individual directed by the principal to sign the principal's name on the power of attorney and (ii) acknowledged. A signature on a power of attorney is presumed to be genuine if the principal acknowledges the signature before a notary public or other individual authorized by law to take acknowledgements.” As previously discussed, the importance of this section is the limitation of liability under N.C.G.S. Section 32C-1-119 for third persons accepting powers of attorney that otherwise may have resulted in liability to the third person for conducting a transaction under a forged or otherwise invalid power of attorney.

A power of attorney executed in North Carolina on or after Jan. 1, 2018 will be valid if it complies with the requirements of N.C.G.S. Section 32C-1-105. N.C. 32C-1-106(a). Similar to other provisions in the NCUPOAA, the importance of this section to third persons is the assurance of validity of a power of attorney; it is this assurance that is at the underpinnings of the broad grant of protection from liability afforded third persons under N.C.G.S. Section 32C-1-119. Understanding that clients are more mobile and in an effort to further promote acceptance of powers of attorney, a power of attorney executed in another state is valid in North Carolina if, when the power of attorney was executed, the execution complied with the law of the jurisdiction that determines the meaning and effect of the power of attorney pursuant to N.C.G.S.
Section 32C-1-107 or the requirements of a military power of attorney pursuant to Section 10 U.S.C. 1044b, as amended. Again, the interchange between N.C.G.S. Section 32C-1-119(d)(2) whereby a third person may request an opinion of counsel, N.C.G.S. Section 32C-1-106(c) relating to validity of foreign powers of attorney, and the safe harbors for rejections of powers of attorney under N.C.G.S. Section 32C-1-120(c) is highlighted when reviewing the statutory framework of the NCUPOAA through the lens of promoting acceptance of powers of attorney executed in foreign jurisdictions. In the past, notwithstanding the penalties for unreasonable refusals to recognize powers of attorney provided in N.C.G.S. Section 32A-41(a), third persons were nonetheless reluctant to accept out-of-state powers of attorney in fear of facing liability for transactions conducted thereunder.

A photocopy or electronically transmitted copy of an original power of attorney has the same effect as the original except as provided by statute other than Chapter 32C. N.C.G.S. § 32C-1-106(d). While original powers of attorney will still be required in various instances (e.g. recordation), it is anticipated that this provision of the NCUPOAA will assist in furthering the acceptance of powers of attorney by third persons by action of the limitation of liability under N.C.G.S. Section 32C-1-119.

The provisions of N.C.G.S. Section 32C-1-109 provide for when a power of attorney is effective. Similar to the provisions of the NCUPOAA relating to durability, execution and validity, the statutory framework for the effectiveness of a power of attorney is critical in the role of assuring that third persons are protected from liability when accepting powers of attorney. “A power of attorney is effective when executed unless the principal provides in the power of attorney that it becomes effective at a future date or upon the occurrence of a future event or contingency.” N.C.G.S. § 32C-1-109(a). As such, a third person may rely on such a power of attorney as being valid under N.C.G.S. 32C-1-119 absent actual knowledge to the contrary. If a power of attorney is effective upon the occurrence of a future event or contingency under N.C.G.S. Section 32C-1-109(b) or upon the incapacity of the principal under N.C.G.S. Section 32C-1-109(c), it follows that a third person may not rely on the broad release from liability in same manner that it may do so for powers of attorney immediately effective under N.C.G.S. Section 32C-1-109(a). As third persons are charged with the knowledge of the requirement of an occurrence of a future event or contingency as indicated in a power of attorney, it follows that they must take additional steps to ensure the effectiveness of the power of attorney before conducting transactions with the agent thereunder. It should be noted that the NC drafters included a provision in N.C.G.S. Section 32C-1-109 to ensure that once a power of attorney under N.C.G.S. Section 32C-1-109(c) becomes effective, it does not subsequently become ineffective upon the principal’s regaining capacity. This provision was added in direct response to case law that held third persons have a duty under these types of powers of attorney to verify the effectiveness of the power of attorney for each transaction conducted thereunder.

Under N.C.G.S. Section 32C-1-111, a principal may designate two or more persons to act as coagents. While a principal may require in the power of attorney that coagents act jointly, absent such an expression of intent, each coagent may exercise the coagents’ authority independently and without the knowledge, consent, or joinder of any other agent or coagents, as the case may be. Additionally, unless the power of attorney provides otherwise, if any one or more coagents resigns, dies, becomes incapacitated, or otherwise fails to act, the remaining agent or coagents may continue to act on behalf of the principal. It is anticipated that presumption of joint and several authority of coagents will further promote acceptances of powers of attorney.

Conclusion

The NCUPOAA provides much needed clarity and protection to third persons who are asked to accept powers of attorney. While current NC statutes extended protections similar to those found in N.C.G.S. Sections 32C-1-119 and 120, other provisions in the NCUPOAA provide additional clarity and further assurances to third persons that hopefully will lead to greater effectiveness of powers of attorney in North Carolina.

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